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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-68

STATE OF NEW JERSEY,
Petitioner,

v.

HARRY JOSEPH KAISER, and HARRY JOSEPH KAISER, as Administrator of the Estate of SUSAN KAISER, Deceased,
Defendants.

UNITED STATES OF AMERICA,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, State of New Jersey, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which on March 13, 1973 reversed a judgment rendered October 15, 1971 by the United States District Court for the District of New Jersey.

The Opinion Below

The United States District Court for the District of New Jersey in an opinion by Judge Shaw ruled that moneys seized in a raid (the facts pertaining thereto are set forth in the statement of the case) belonged to the State of New Jersey. This opinion was unreported and is included as Appendix B. The United States Court of Appeals for the Third Circuit reversed the District Court and ruled, in an unreported opinion that said moneys belonged to the United States. This opinion is included as Appendix A.

Jurisdiction

(i) The judgment sought to be reviewed is the ruling by the United States Court of Appeals for the Third Circuit, dated March 13, 1973, which reversed a prior judgment rendered by the United States District Court, for the District of New Jersey.

(ii) Jurisdiction of this appeal is conferred on this Court by Title 28 of the United States Code, Section 1254 (1), 28 U.S.C. 1254 (1).

(iii) Jurisdiction of this appeal is further conferred by the considerations set forth in Title 28 of the United States Code, Rule 19 (1) (b) of the Rules of the Supreme Court of the United States, in that ". . . a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter," and ". . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

Questions Presented by this Appeal

1. May a Federal Court in applying applicable state law ignore rulings and interpretations of that law by that state's highest court, even if the Federal Court disagrees with such rulings and interpretations?

   (a) In applying state law to determine whether a taxpayer has "property" or "rights to property" under Title 26, United States Code Section 6321 in accordance with the United States Supreme Court's decision in *Aquilino* v. *United States,* 363 U. S. 509, 4 L. Ed. 2nd 1365 (1950) may a Federal Court ignore rulings by that state's highest court as to whether a taxpayer ever acquires rights to gambling moneys or moneys derived from gambling operations?

   (b) May a Federal Court in applying New Jersey Stat. Ann. 2A:152-6 and 2A:152-7 conclude that these statutes require an active employment of seized money in a gambling operation when in fact the highest state court has interpreted these statutes as not setting forth this restrictive requirement?

Statement of the Case

The issue and facts in this case are accurately set forth in the opinion of Judge Shaw at the District Court level:

> "A search warrant was executed by the New Jersey State Police on July 14, 1960, at 53 Forrest Place, North Arlington, New Jersey. Betting slips and other gambling paraphernalia were found on the first floor of the premises together with a substan-

tial amount of cash. There were two bedrooms on the second floor and one was searched. The search of a chest of drawers produced bundles of $1 bills and bundles of $100 bills, the total amount found being $3,650. A fire-proof steel chest was observed in this bedroom. It was 13″ wide, 16½″ long and 9″ in depth and was locked. It was pried open by the police and found to be packed full of cash amounting to $265,000. There is evidence which permits the inference that Joseph Moriarity occupied this bedroom at one time. Prescription bottles issued to Moriarity were found in a desk drawer and items of personal property found in the bedroom support such inference. Subsequent to the raid it was discovered that Moriarity had two keys which would open the lock of the vault. There was a long and continuous record of convictions of Moriarity for gambling going back to 1935. Officer Frank P. Kolodzieski of the New Jersey State Police testified that he had three sheets of records of such convictions with seven convictions listed on each sheet. This officer, who qualified for expert testimony on gambling operations, stated that it was his opinion that the $265,000 found in the vault or steel box was part of a gambling operation. There is evidence that the betting slips found on the first floor indicated approximately $12,000 in receipts for the day.

"Joseph Toscano, an agent of the Internal Revenue Service, Intelligence Division, with extensive experience in gambling operations and investigations, stated that mere calculations of lottery slips found at a given time on a particular day would not furnish a basis for an accurate conclusion as to the size of the gambling business conducted over a pe-

riod of time. He characterized the premises as '. . . the counting house where the slips wind up and the winners are determined and certain bookkeeping takes place with regard to the correct amounts that different people are reporting and any mistakes that are encountered in the numbers, and different things that take place in this business, the counting house where the slips go daily.'

"This witness further testified that it is not general practice for those engaged in illegal gambling operations to utilize banks for deposit of money or to keep commercial records of transactions. He expressed the opinion that the money found in the box was money that Moriarity was stashing away for the time when he was going to get out of the gambling business. He further identified Moriarity as a man who had been conducting illegal gambling operations from as early as 1930."

"The question of fact to be resolved is whether the $265,000 found in the box was money which has been accumulated by Moriarity from his gambling operations which pre-dated the Government lien. There is evidence that Moriarity also conducted a news business, but the evidence as to his profits from his newsboy activities is not entirely credible. On the other hand, his long record of operations in illegal gambling has not been refuted. The summary of his career as set forth by the New Jersey Supreme Court in *Farley* v. *$168,400.97*, 55 N. J. 31, 259 A. 2d 201 (1969), was corroborated at the evidentiary hearing by Officer Kolodzieski and Treasury Agent Toscano produced by the Government. In writing the opinion for the New Jersey Supreme Court in *Farley* v. *$168,400.97, supra*, Chief Justice Weintraub stated:

For many years Moriarity was a notorious 'kingpin' and in the 'numbers racket' in and around Jersey City. His criminal record in that field dates from the 1930s. On March 2, 1962 he was sentenced to State Prison on a guilty plea to possession of lottery slips, and he remained in the State's custody until March 12, 1964, when he was delivered to federal authorities who held him until January 6, 1965.

While Moriarity was thus in custody, a chance even occurred which ultimately led to this litigation. On July 3, 1962 some workmen, renovating private garages at 127-131 Oxford Avenue, Jersey City, discovered $2,438,110 in currency and sundry papers in an old automobile. Those papers revealed Moriarity's operation of a gambling enterprise over an extended period. (259 A. 2d 201 at 202).

"There is no doubt that the premises at 53 Forrest Place, North Arlington, occupied by the Kaisers at the time of the raid was the situs of a substantial gambling business. The nature of that business and the gambling paraphernalia found at the time of the raid indicate that the business had been in operation for a considerable period of time. The evidence also permits as the more reasonable inference that Moriarity had at one time occupied the bedroom on the second floor and had access to the strong box in which $265,000 in cash was stashed away. The Kaisers had access to this bedroom and the strong box, weighing from 20 to 25 pounds, was in their possession and under their control. The fact that the Kaisers did not produce a key to open it does not eliminate the likelihood that they did

have access to it or could have gained access to it. Two keys were found in the possession of Moriarity, but they were keys which could be duplicated. It is also significant that a substantial amount of cash was also found in this bedroom in a chest of drawers to which the Kaisers had ready access."

The Federal Question Is Substantial

The relevant statute in this matter is N. J. Stat. Ann. 2A:152-7 which states:

> "Whenever any money, currency or cash shall be seized or captured by the police, constabulary or other officer in connection with any arrest for violation of or conspiracy to violate any gambling law of this state, the said money, currency or cash shall be deemed prima facie to be contraband of law as a gambling device, or as part of a gambling operation, and it shall be unlawful to return the said money, currency or cash to the person or persons claiming to own the same, or to any other person, except in the circumstances and manner hereinafter provided."

The opinion of the United States Court of Appeals for the Third Circuit in this case has deviated from the interpretation of this statute by the New Jersey Supreme Court in its reported decisions in the following cases: *Farley* v. *$168,400.97,* 55 N. J. 31, 259 A. 2d 201 (1969); *Spagnuolo* v. *Bonnet,* 16 N. J. 546, 109 A. 2d 623 (1954); *State* v. *Link,* 14 N. J. 446, 102 A. 2d 609 (1954). In fact, the opinion of the Third Circuit by Judge Adams agrees only with the concurring opinion of Judge Adams in another Third Circuit decision in a similar matter,

Stapleton v. *$2,438,110,* 454 F. 2d 1210, cert. denied, 93 S. Ct. 111 (1972).

The crux of the Third Circuit opinion was that in order for moneys to become forfeit to the state they must be shown to have been actively employed in a gambling operation. Alluding to *Stapleton,* supra, the court stressed that funds which have passed out of operation and have become accumulated profits are no longer actively involved in gambling operations and are not forfeitable to the state. Rather such funds may be claimed by the Federal Government as part of its tax lien. The distinction in the status of the money affects its ultimate disposition since a tax lien can only attach to property belonging to the taxpayer under 26 U.S.C. 6321.

This opinion, however, ignores the fact that the main opinion in *Stapleton* alluded to the District Court opinion in *Kaiser.* Judge McLaughlin stated in his concluding paragraph:

> "by a last minute effort to bolster up appellee's position, the opinion in State of New Jersey v. Kaiser, United States District Court for the District of New Jersey, October 15, 1971 is now put forward on behalf of appellee. In that decision the money seized was affirmatively proven to be part of a current gambling operation where betting slips were found indicating approximately $12,000 in gambling receipts for the very day of the seizure."

The District Court relied on *Spagnuolo* v. *Bonnet,* supra, in stressing that the source of the money, not present utilization was the determinative factor in establishing the status of the money. The Third Circuit disagreed and relied on *Stapleton* instead, notwithstanding that the

New Jersey Supreme Court in *Farley* v. *$168,400.97,* supra, cited *Spagnuolo* approvingly, and stated in conclusive terms that *Spagnuolo* took the correct view. Under both *Spagnuolo* and *Farley* title to the money vests in the state at the time of its use in gambling. The language in *State* v. *Link,* supra, is also in accord. The court there stated:

> "The proof seems to indicate that if it is anybody's money it is Link's money, and it was money used either as the proceeds of or in connection with, set apart and segregated, as part of his gambling operations in this county, Cumberland County and Passaic County, and I think the conclusion is inevitable that the money is forfeited to the sole use of the County of Bergen."

Under clear language of New Jersey Supreme Court decisions the label attached to the money does not change its character.

Under the reasoning of *Spagnuolo* the forfeiture becomes absolute at the time of the commission of the prohibited act and from that moment on, nothing can grant the taxpayer a right in the money. If he cannot achieve a right in the money once it is used, then whatever status the money subsequently attains is irrelevant; it is a meaningless endeavor in semantics. Perorations on whether money has passed out of active gambling operations into accumulated profits deviate from the interpretations of N.J.S.A. 2A:152-7 by the highest state court in New Jersey. It is further clear that the date of the seizure is irrelevant, for under the aforecited cases the state law of New Jersey is that so long as there is an arrest, and money is seized in connection with *any* arrest the terms of N.J.S.A. 2A:152-7 apply and demand adherence. In *Link,* Link had been arrested before the seizure of the

money, and the Court rules that the dates of both events need not coincide.

The ruling by the Third Circuit sidestepped interpretations by the New Jersey Supreme Court of N.J.S.A. 2A:152-7. As Justice Stone stated in *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, 236-237, 85 L. Ed. 139, 144 (1940):

> "A State is not without law save as its highest court has declared it . . . state law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

Since under *Aquilino* v. *United States,* 363 U. S. 509, 4 L. Ed. 2d (1960), the state law controls in matters concerning rights of a taxpayer to property under 26 U.S.C. 6321, and since the New Jersey Supreme Court has affirmatively stated and reiterated that gambling moneys are forfeit at the time of their illegal use, the decision of the Third Circuit has repudiated state law.

Accordingly, it is deemed essential that the jurisdiction of this court be invoked to decide the federal questions raised herein.

Respectfully submitted,

GROSS, DEMETRAKIS & DONOHUE
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By: ALBERT GROSS
Counsel for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1075

STATE OF NEW JERSEY,
Plaintiff-Appellee,

v.

HARRY JOSEPH KAISER and HARRY J. KAISER, as Administrator of the Estate of Susan Kaiser, Deceased,
Defendants.

UNITED STATES OF AMERICA,
Intervenor-Appellant.

(D.C. Civil Action No. 496-63)

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)
February 13, 1973

Appendix A

Before VAN DUSEN and ADAMS, Circuit Judges.
and BRODERICK, District Judge.

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OPINION OF THE COURT

(Filed March 13, 1973)

PER CURIAM:

The conflicting claims of the United States and Bergen County, New Jersey to a large sum of money, seized during a search of premises suspected of being the site of a gambling operation, form the basis of this appeal. Central to the resolution of these competing claims is the determination whether that fund, to wit $265,000, represents an instrumentality of illegal activity and thus

contraband, forfeitable to the state or county, or an accumulation of funds or profits derived from illegal activity, and thus subject to a lien asserted by the United States.

The facts giving rise to this controversy are fully explicated in the opinion of the district court and need only summarization at this point.

On July 14, 1960, a raid pursuant to a search warrant was conducted on a house in North Arlington, New Jersey. This house was occupied at that time by Harry Kaiser, Susan Kaiser and Edna Kaiser. The search of the first floor of the house uncovered numbers slips, gambling paraphernalia and a sum of cash totaling slightly more than $18,500. The second floor of the house contained two bedrooms. The search of one of the bedrooms produced $3,650, in a chest of drawers. Further search of that room revealed a fireproof steel strong-box. Because the Kaisers did not have a key for it, the police had to force open the box. When opened, the box was found to contain $265,000. Beyond this large sum of money, the search produced clothing and two prescriptions indicating that this bedroom had been occupied by one Joseph Moriarity. Later investigation revealed that Moriarity had in his possession keys which would open the strong-box.

Joseph V. Moriarity has an extensive record of involvement in illegal gambling. *See* Farley v. $168,400.97, 55 N.J. 31, 259 A.2d 201 (1969). In August, 1947, a federal income tax delinquency was assessed against Moriarity and demand for payment made. In 1955, a judgment on this delinquency was entered. Thus, the Federal government has a lien on property belonging to Moriarity. And the claims of the Federal government exceed $265,000.

Appendix A

New Jersey a statutory schema requiring forfeiture of certain seized contraband. N.J. Stat. Ann. §2A:152-6 provides that, when seized, "any furniture, implement, device or machine, made or used for the purpose of gambling" becomes the property of the county. It is the county's burden, however to prove illegal use. Krug v. Board of Chosen Freeholders, 3 N. J. Super. 22, 65 A. 2d 542 (App. Div. 1949). N.J. Stat. Ann. §2A:152-7, enacted after 152-6, permits the assumption that if money is seized in connection with an arrest for violation of the gambling laws the money is *prima facie* contraband and forfeitable. Both statutes require, however, that there be an active employment of the money in a gambling operation. *See* Krug v. Board of Chosen Freeholders, *supra.*

The district court, relying on Spagnuolo v. Bonnet, 16 N. J. 546, 109 A. 2d 623 (1954), stated its belief that the *source* of the money, not the present utilization of the sum, determines whether it is an element in a gambling enterprise for the purpose of the state forfeiture. Finding that the money was the product of a gambling enterprise, the district court determined that the money was forfeitable. Therefore, it reasoned, the money was not an asset of Moriarity's and hence not subject to the lien of the Federal government. Thus, the district court held that the state's claim to the money was to prevail.

The district court issued its opinion on October 15, 1971. On January 25, 1972, this Court decided the case of Stapleton v. $2,438,110.[1] *Stapleton* also involved Moriarity, his tax lien, and money found belonging to him. In *Stapleton,* as here, there were competing claims for the money,

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[1] 454 F.2d 1210 (3d Cir.), *cert. denied,* 41 U.S.L.W. 3188 (U.S. Oct. 10, 1972).

the state claiming that the money was forfeitable under the state statutory arrangement, the Federal government asserting its rights under the tax lien. Implicit in the opinion of the Court and explicit in the concurring opinion of Judge Adams was the differentiation between funds seized which are actually in use in furtherance of a gambling operation and funds which have passed out of the operation and become accumulated profits. In holding that the funds in *Stapleton* were to go to the Federal government, that case makes clear that only funds actively used in gambling operation are forfeitable to the state.[2]

The determinative issue thus can be stated fairly simply. If the $265,000. is money that is being used as an element in a gambling operation revealed in the search, then pursuant to the New Jersey statutes, the money is forfeitable to the state. If, however, the money is not an element in the enterprise but "an accumulation of profits or the product of gambling," following *Stapleton*, it is not subject to state forfeiture. If the money is forfeitable, the Federal lien does not attach because the fund cannot be deemed the property of Moriarity. On the other hand, if the sum is not forfeitable, then, assuming that the sum is Moriarity's,[3] it becomes subject to attachment by operation of the lien.

---

[2] The *Stapleton* opinion made reference to the decision of the district court in this case. Although the opinion states that the money seized in this case was "proven to be a part of a current gambling operation" our review of the record and the opinion of the district court indicate the contrary, as will be discussed *infra*.

[3] As the Kaisers have disclaimed any rights, title or interest in the $265,000. there can be no question but that the sum is Moriarity's.

Appendix A

Our review of the findings of the district court indicates that the $265,000. was not actively used in a gambling operation but was an accumulation of profits or proceeds, of some enterprise, not necessarily the one revealed in the July 14, 1960 search. The numbers operation uncovered in the search of the Kaiser's house appeared to have receipts for the day totaling approximately $12,000. Uncontradicted expert testimony showed that the cash reserve, or "bank," necessary to support a numbers operation need be only one-half of the daily handle. Thus, the $265,000. clearly was not the "bank" of that operation. Indeed, the district court stated, "[I]t was accumulated out of the proceeds. . . . The fact that the $265,000. may not have been used in the daily operation and financing of the gambling business being conducted in the Kaiser's residence would in no way affect the presumption that the money was the proceeds of a gambling operation."

Under our holding in *Stapleton,* these findings require that the fund be awarded to the United States under the lien against Moriarity rather than be forfeited to the state as contraband. Therefore, the judgment of the district court must be reversed.

The case will be remanded to the district court for the entry of a judgment in conformity with this opinion. Costs to be taxed to each side.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Opinion of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 496-63

STATE OF NEW JERSEY,

Plaintiff,

v.

HARRY JOSEPH KAISER and SUSAN KAISER,

Defendants,

v.

UNITED STATES OF AMERICA,

Intervenor.

Appearances:

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United States Attorney
By: *Alfred C. De Cotiis, Esq.*
Asst. United States Attorney
For the Government

SHAW, U.S.D.J.

Appendix B

The Government asserts a lien against money seized in a gambling raid made by New Jersey State Police on July 14, 1960, on premises known as 53 Forrest Place, North Arlington, New Jersey. It is contended by the County of Bergen that the cash found on the premises and seized by the police was contraband and that the Government is not entitled to any part thereof in satisfaction of its lien for income tax. At the time of the raid the premises were occupied by Harry Kaiser, Susan Kaiser and Edna Kaiser. Susan Kaiser (now deceased) claims that $6,000 of the money found on the premises had not been used for gambling purposes and was her own personal property and, therefore, not contraband. Since she has [2] demanded trial by jury, her claim (now prosecuted by her personal representative) has been severed and will be dealt with separately.

The issue presented for disposition now is whether the Government lien for income taxes became effective before the cash became contraband and subject to forfeiture to the State. It is contended by the Government that $265,000 of the cash seized was in a locked vault and was the property of Joseph Moriarity, a notorious gambler.

On August 12, 1947, a tax delinquency in the amount of $81,356.10 was assessed against Moriarity. On August 26, 1947, there was demand for payment of the assessment. On March 8, 1955, judgment was obtained in favor of the United States against Moriarity for $161,139.72, plus costs. The raid occurred on July 14, 1960, at which time the Kaisers were arrested and $275,841.85 was seized and delivered to the Bergen County Treasurer. The Kaisers were indicted and convicted of gambling operations on the premises and the convictions were affirmed by the Appellate Division of the Superior Court of New Jersey.

Appendix B

State v. *Kaiser*, 74 N. J. Super. 257, 181 A. 2d 184 (App. Div. 1962). A petition for certification to the New Jersey Supreme Court was denied on September 17, 1962.

An evidentiary hearing was conducted to determine whether Moriarity had property rights in the funds seized when the federal liens came into existence. The pertinent facts adduced at hearing can be briefly summarized as follows:

A search warrant was executed by the New Jersey State Police on July 14, 1960, at 53 Forrest Place, North Arlington, New Jersey. Betting slips and other gambling paraphernalia were found on the first floor of the premises together with a substantial amount of cash. There were two [3] bedrooms on the second floor and one was searched. The search of a chest of drawers produced bundles of $1 bills and bundles of $100 bills, the total amount found being $3,650. A fire-proof steel chest was observed in this bedroom. It was 13″ wide, 16½″ long and 9″ in depth and was locked. It was pried open by the police and found to be packed full of cash amounting to $265,000. There is evidence which permits the inference that Joseph Moriarity occupied this bedroom at one time. Prescription bottles issued to Moriarity were found in a desk drawer and items of personal property found in the bedroom support such inference. Subsequent to the raid it was discovered that Moriarity had two keys which would open the lock of the vault. There was a long and continuous record of convictions of Moriarity for gambling going back to 1935. Officer Frank P. Kolodzieski of the New Jersey State Police testified that he had three sheets of records of such convictions with seven convictions listed on each sheet. This officer, who qualified for expert testimony on gambling operations, stated that it was his opin-

ion that the $265,000 found in the vault or steel box was part of a gambling operation. There is evidence that the betting slips found on the first floor indicated approximately $12,000 in receipts for the day.

Joseph Toscano, an agent of the Internal Revenue Service, Intelligence Division, with extensive experience in gambling operations and investigations, stated that mere calculations of lottery slips found at a given time on a particular day would not furnish a basis for an accurate conclusion as to the size of the gambling business conducted over a period of time. He characterized the premises as ". . . the counting house where the slips wind up and the winners are determined and certain bookkeeping takes place with [4] regard to the correct amounts that different people are reporting and any mistakes that are encountered in the numbers, and different things that take place in this business, the counting house where the slips go daily."

This witness further testified that it is not general practice for those engaged in illegal gambling operations to utilize banks for deposit of money or to keep commercial records of transactions. He expressed the opinion that the money found in the box was money that Moriarity was stashing away for the time when he was going to get out of the gambling business. He further identified Moriarity as a man who had been conducting illegal gambling operations from as early as 1930.

The question of fact to be resolved is whether the $265,000 found in the box was money which had been accumulated by Moriarity from his gambling operations which pre-dated the Government lien. There is evidence that Moriarity also conducted a news business, but the

evidence as to his profits from his newsboy activities is not entirely credible. On the other hand, his long record of operations in illegal gambling has not been refuted. The summary of his career as set forth by the New Jersey Supreme Court in *Farley* v. *$168,400.97*, 55 N. J. 31, 259 A. 2d 201 (1969), was corroborated at the evidentiary hearing by Officer Kolodzieski and by Treasury Agent Toscano produced by the Government. In writing the opinion for the New Jersey Supreme Court in *Farley* v. *$168,400.97, supra,* Chief Justice Weintraub stated:

[4]

> For many years Moriarty was a notorious "kingpin" in the "numbers racket" in and around Jersey City. His criminal record in that field dates from the 1930s. On March 2, 1962 he was sentenced to State Prison on a guilty plea to possession of lottery slips, and he remained in the State's custody until March 12, 1964, when he was delivered to federal authorities who held him until January 6, 1965. While Moriarty [5] was thus in custody, a chance event occurred which ultimately led to this litigation. On July 3, 1962 some workmen, renovating private garages at 127-131 Oxford Avenue, Jersey City, discovered $2,438,110 in currency and sundry papers in an old automobile. Those papers revealed Moriarty's operation of a gambling enterprise over an extended period. (259 A. 2d 201 at 202).

There is no doubt that the premises at 53 Forrest Place, North Arlington, occupied by the Kaisers at the

time of the raid was the situs of a substantial gambling business. The nature of that business and the gambling paraphernalia found at the time of the raid indicate that the business had been in operation for a considerable period of time. The evidence also permits as the more reasonable inference that Moriarity had at one time occupied the bedroom on the second floor and had access to the strong box in which $265,000 in cash was stashed away. The Kaisers had access to this bedroom and the strong box, weighing from 20 to 25 pounds, was in their possession and under their control. The fact that the Kaisers did not produce a key to open it does not eliminate the likelihood that they did have access to it or could have gained access to it. Two keys were found in the possession of Moriarity, but they were keys which could be duplicated. It is also significant that a substantial amount of cash was also found in this bedroom in a chest of drawers to which the Kaisers had ready access.

The operation of 26 U.S.C. 6321, 6322, which creates a federal tax lien, and 26 U.S.C. 7403, which provides for a civil action to enforce a lien, are dependent upon state law concerning whether the taxpayer had "property" or "rights to property" in a fund which can be reached by federal authority. *Aquilino* v. *U. S.*, 363 U. S. 509, 512-513 (1960). Under state law N.J.S.A. 2A:152-7 it is provided that whatever currency is seized in connection with any arrest for violation [6] of or conspiracy to violate any gambling laws, the currency shall be deemed *prima facie* to be contraband of law as part of a gambling

operation.[1] A presumption is, therefore, created which, unless rebutted, will prevail. *Farley* v. *$168,400.97, supra.*

In this case the seizure occurred subsequent to the time when the Government's lien was perfected by judgment, but the forfeiture to the State does not depend upon the time of the arrest and the seizure. The forfeiture occurs as of the time the property becomes contraband by virtue of its illegal use. In *Farley* v. *$168,400.97,* supra, it was stated:

> In short, then, when a statute provides for a forfeiture, the forfeiture takes place upon the occurrence of the forbidden act or omission unless the statute provides otherwise, and the sovereign's title is in no sense inchoate because procedural due process requires an opportunity to dispute the claim of forfeiture in a judicial proceeding. The judgment in such a proceeding simply resolves a title contest, as it does in other settings, as when the situs of ownership depends upon the construction of a will or deed, or upon a relationship to a deceased, or upon adverse possession. The judgment

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[1] N.J.S.A. 2A:152-7. *Money seized on arrest for playing unlawful games; return prohibited; exceptions*

Whenever any money, currency or cash shall be seized or captured by the police, constabulary or other officer in connection with any arrest for violation of or conspiracy to violate any gambling law of this State, the said money, currency or cash shall be deemed prima facie to be contraband of law as a gambling device, or as part of gambling operation, and it shall be unlawful to return the said money, currency or cash to the person or persons claiming to own the same, or to any other person, except in the circumstances and manner hereinafter provided.

> which settles the dispute does not initiate the title; it serves only to confirm the title by dissipating claims against it. (259 A. 2d 201 at 206).

The Court finds from the evidence that the $265,000 found in the strong box was accumulated by Moriarity or by him and the Kaisers jointly as a result [7] of illegal gambling operations and that as of the time the lien of the Government came into existence neither Moriarity nor the Kaisers had any "property" or "rights to property" in the money. The forfeiture occurred at a time and by virtue of the fact that it represented the fruits of an illegal gambling operation. It is the opinion of the Court that this money as well as the other vast sums accumulated by Moriarity could not be attributed to proceeds from the operation of a newsstand. All evidence points to the contrary inference, namely, that it was accumulated out of illegal gambling operations. Moreover, considering the fact that the Kaisers had a substantial degree of control over this small strong box, it cannot be said without equivocation that the money was not the product of a joint gambling enterprise although the money may have represented Moriarity's share. The fact that the $265,000 may not have been used in the daily operation and financing of the gambling business being conducted in the Kaiser residence would in no way affect the presumption that the money was the proceeds of a gambling operation. The testimony of Agent Toscano, a Treasury agent well trained in illicit gambling operations and with extensive investigative experience, has, when considered with the other evidence, very cogent force in leading to the conclusion that the $265,000 represented the proceeds of illegal gambling. He stated in answer to a hypothetical question predicated upon all of the evidence:

> —I would say it would be my assumption from these facts, as you have outlined them, that this locked box would be money that Moriarity was stashing away for some day when he was going to get away from this business and go out and live the rest of his life in peace and contentment.

The attempt of the Government to establish that this money was in Moriarity's possession before he engaged in the business of illegal gambling or [8] that he accumulated it from his newsstand business lacks the probative force to rebut the presumption of contraband. In *Spagnuolo* v. *Bonnet,* 16 N. J. 546, 109 A. 2d 623 (1954), the New Jersey Supreme Court stated:

> The established rule is that the forfeiture becomes absolute at the commission of the prohibited acts and the title from that moment vests in the state or government in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of the law, without giving any alternative remedy or providing any substitutes for forfeiture or allowing any exceptions to its enforcement, and that in all such cases it is not in the power of the offender or the former owner to defeat the forfeiture by any subsequent transfer of the property, even as to a *bona fide* purchaser for value, without notice of the wrongful acts done or committed by the former owner. The forfeiture is considered as directed against the thing itself, not merely the possessor's interest in it. In re Henderson's Distilled Spirits, supra. Therefore, we must conclude that at the time the jeopardy assessment was attempted to be levied against the

particular monies in this case, seized under the circumstances in which they were, title to the property was then in the County of Essex. At most the federal lien could only attach to Edward Spagnuolo's inchoate right to sue for the return of the funds in the event of his acquittal and not to the confiscated funds themselves. The federal lien can rise no higher than the rights of the taxpayer. Id. 630-631.

The fact that at some point in time money is no longer used in a gambling operation does not divest the State of an interest which it has. There may, of course, be situations where the money is placed in the stream of commerce and finds its way into the hands of a *bona fide* purchaser which would invite equitable considerations in the matter of title, but such a situation is not presented here.

The final argument of the Government is that it has standing to urge the money seized was the fruit of an unlawful search. This Court disagrees. [9] The Government has no standing to raise the issue of an illegal search and seizure. As to this aspect of the matter, this Court finds the reasoning of the New Jersey Supreme Court in *Farley* v. *$168,400.97, supra,* where the same contention was made, sound and applicable to the present case.

Judgment will be entered in favor of the State and against the United States with prejudice and without costs.

An appropriate order for entry of judgment may be submitted.

Dated: October 15, 1971

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1075

STATE OF NEW JERSEY,

vs.

HARRY JOSEPH KAISER, and Harry J. Kaiser, as Administrator of the Estate of Susan, Kaiser, deceased,

UNITED STATES OF AMERICA,

(Intervenor), Appellant.

(D. C. Civil Action No. 496-63)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

VAN DUSEN and ADAMS, Circuit Judges and BRODERICK, District Judge.

Appendix C

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 27, 1971, be, and the same is hereby reversed, and the cause remanded for the entry of a judgment in conformity with the opinion of this Court. Each side to bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

March 13, 1973

Certified as a true copy and issued in lieu of a formal mandate on April 4, 1973.

Test:

THOMAS E. QUINN
Clerk, U. S. Court of Appeals
for the Third Circuit